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IN THE
COURT OF APPEALS
SEVENTH JUDICIAL DISTRICT
AMARILLO, TEXAS

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TERRY MARTIN
V.
THE STATE OF TEXAS

ON APPEAL FROM THE COUNTY COURT AT LAW NO. TWO
OF LUBBOCK COUNTY, TEXAS
CAUSE NO. 2019-494,736

BRIEF FOR THE STATE

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Trial Judge:

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Ninth Issue Presented (Responsive to Appellant's Fifteenth Issue): Appellant argues in his fifteenth issue that the evidence is legally insufficient to show that Appellant was one of the "members" who regularly or continuously engaged in criminal activity. In assessing the sufficiency of the evidence, an appellate court views all the evidence in the light most favorable to the verdict and determines whether, based on that evidence and any reasonable inferences therefrom, a rational juror could have found the essential elements of the offense beyond a reasonable doubt. After viewing the evidence in the light most favorable to the verdict, the evidence is legally sufficient to show that Appellant qualified as a "member" of a criminal street gang. The evidence shows that Appellant is one of three or more persons in the Cossacks Outlaw Motorcycle Gang who continuously or regularly associate in the commission of criminal activities based on his four years of

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NO. 07-19-00082-CR

IN THE
COURT OF APPEALS
SEVENTH JUDICIAL DISTRICT
AMARILLO, TEXAS

TERRY MARTIN
V.
THE STATE OF TEXAS

BRIEF FOR THE STATE

To the Honorable Court of Appeals:

The State of Texas, the prosecuting authority in Cause No. 2019-494,736 in the County Court at Law No. 2 of Lubbock County, and Appellee before the Seventh Court of Appeals, respectfully submits this brief in reply to the brief filed by Appellant appealing his conviction for the offense of Unlawfully Carrying a Weapon. The parties will be referred to as "Appellant" and "State." *See* TEX. R. APP. P. 3.2.

Statement of the Case

Appellant was charged by information on January 8, 2019, with the offense of Unlawfully Carrying a Weapon. (Clerk's Record "CR" p. 14). The information alleged that Appellant, "heretofore on or about 17th day of April, A.D. 2018, did then and there intentionally, knowingly, or recklessly carry on or about his person a handgun in a motor vehicle that was owned by the defendant or under the defendant's control at the time the defendant was a member of a criminal street gang, to wit: COSSACKS MOTORCYCLE GANG, as defined by Section 71.01." *Id.* One prior misdemeanor conviction was alleged for misdemeanor enhancement purposes. (CR pp. 22—23). Following a three-day jury trial, from January 28—29 and January 31, 2019, Appellant was convicted of the offense. (CR p. 65) (Reporter's Record "RR" vol. 5, p. 49). Appellant was sentenced to a fine of $400.00 on January 31, 2019. (CR p. 70) (RR vol. 5, p. 69). Appellant's motion for new trial was initially granted, but was later overruled by the trial court. (CR pp. 73—75, 81, 87—90) (Status Conference Reporter's Record "S.C. RR" p. 4). The trial court certified that Appellant has the right of appeal. (CR pp. 53, 82).

Statement of Facts

Corporal Michael Macias with the Lubbock County Sheriff's Office was on patrol north of New Deal on April 17, 2018, when he observed a motorcycle pass him. The motorcycle was traveling faster than the posted speed limit. Macias also observed the motorcycle as having an obscured license plate and making an unsafe lane change. (RR vol. 3, pp. 14—15, 31). Macias conducted a traffic stop of Appellant based on the traffic violations. (RR vol. 3, p. 15). After observing Appellant's motorcycle vest, also known as a "cut," which identified him as a member of the Cossack Outlaw Motorcycle Gang, Macias conducted a pat-down of Appellant for officer safety purposes. Appellant was carrying a pistol on the inside of his cut or vest. (RR vol. 3, pp. 16, 21). Appellant was placed under arrest and taken to the Lubbock County Detention Center, where various items identifying Appellant as being a member of the Cossacks Outlaw Motorcycle Gang were placed in the Property Room. (RR vol. 3, pp. 25—27, 29—30, 37, 86). Appellant's motorcycle "cut" contained Sergeant's stripes and a portion that said "Cossacks MC, Lubbock County, Mid-Cities, Texas." The Sergeant's stripes indicated that Appellant was previously a Sergeant-at-Arms for the Dallas chapter of the Cossacks. (RR vol. 3, pp. 29, 76—77; vol. 5, pp. 12, 15).

Deputy Joshua Cisneros with the Lubbock County Sheriff's Office identified Appellant as being a member of the Cossacks motorcycle gang. (RR vol. 3, p. 86). Deputy Cisneros identified the Cossack Outlaw Motorcycle Gang as being a criminal street gang. The Cossacks have gang colors (yellow and gold), a gang symbol (the "ugly man"), and an organizational structure. (RR vol. 3, pp. 67—72, 82—84). Members of the Cossacks continuously and regularly engage in assaults, threats of violence, intimidation, and illegal firearms possession. (RR vol. 3, p. 72).

Summary of the Argument

Appellant raises various facial challenges to the constitutionality of Section 46.02(a–1)(2)(C) of the Texas Penal Code in his first through seventh issues on appeal, and raises the same constitutional challenges as as-applied constitutional challenges in his eighth though fourteenth issues on appeal. None of Appellant's constitutional challenges were preserved for appellate review because he did not raise any of his constitutional challenges at the trial court level. Even if Appellant's facial challenges could be addressed on the merits, however, Appellant has not shown that Section 46.02(a–1)(2)(C) is facially unconstitutional for any of the reasons asserted for the first time on appeal.

Appellant argues in his first issue that Section 46.02(a–1)(2)(C) is facially unconstitutional under the Fourteenth Amendment's Equal Protection Clause. Section 46.02(a–1)(2)(C) does not violate Appellant's right to equal protection because the statute survives rational basis review. There is a rational basis for preventing members of criminal street gangs from carrying handguns in their vehicles because the State has a compelling interest in ensuring the safety of its citizens by eliminating gang violence and other criminal activities.

Appellant argues in his second and third issues that Section 46.02(a–1)(2)(C) is facially unconstitutional under the First and Fourteenth Amendments because it impairs the right of association and authorizes state action based on the doctrine of guilt by association. Section 46.02(a–1)(2)(C) does not implicate the constitutional right to freedom of association or authorize state action based on the doctrine of guilt by association because the statute does not prevent gang members from gathering to engage in any activities protected by the First Amendment and does not deem a person to be a "member" of a criminal street gang simply by being associated with an association or group that has three or more members who continuously or regularly associate in the commission of criminal activities.

Appellant argues in his fourth issue that Section 46.02(a–1)(2)(C) of the Texas Penal Code is facially unconstitutional because the statute is substantially overbroad. Section 46.02(a–1)(2)(C) survives intermediate scrutiny because it does not regulate his "cut," but rather regulates the secondary effect of gun violence by gang members.

Appellant argues in his fifth issue that Section 46.02(a–1)(2)(C) of the Texas Penal Code is facially unconstitutional because it violates the constitutional right to travel under the Fourteenth Amendment's Due Process Clause. The statute does not deprive Appellant of the right to travel because it does not deter such travel, impede travel as its primary objective, or use any classification which serves to penalize the exercise of that right.

Appellant argues in his sixth issue that Section 46.02(a–1)(2)(C) of the Texas Penal Code is facially unconstitutional because it deprives Appellant of his Second Amendment right to possess a handgun. Section 46.02(a–1)(2)(C) does not violate Appellant's Second Amendment rights because the right to keep and bear arms is not unlimited. Section 46.02(a–1)(2)(C) serves a compelling interest in ensuring the safety of Texas citizens by eliminating gang violence and other criminal activities.

Appellant argues in his seventh issue that Section 46.02(a–1)(2)(C) of the Texas Penal Code is facially unconstitutional because the statute is

unconstitutionally vague. Section 46.02(a–1)(2)(C) is not void for vagueness because the terms "criminal street gang" and "member," when properly construed, removes any ambiguity in the terms and clarifies what conduct makes an individual a member of a criminal street gang.

Appellant argues in his fifteenth issue that the evidence is legally insufficient to show that Appellant is one of the "members" who regularly or continuously engages in criminal activity. After viewing the evidence in the light most favorable to the verdict, the evidence is legally sufficient to show that Appellant qualifies as a "member" of a criminal street gang. The evidence shows that Appellant is one of three or more persons in the Cossacks Outlaw Motorcycle Gang who continuously or regularly associate in the commission of criminal activities as a member of the gang.

Standard of Review

In a facial challenge to a statute's constitutionality, the claimant asserts that the complained-of law is unconstitutional "on its face," meaning that it operates unconstitutionally in all of its potential applications. *Estes v. State*, 546 S.W.3d 691, 697–98 (Tex. Crim. App. 2018). In a facial challenge to a statute's constitutionality, courts consider the statute only as it is written, rather than how it operates in practice. *State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 908 (Tex. Crim. App. 2011). The reviewing court begins with the presumption that the Legislature acted both rationally and validly in enacting the law under review. *Estes*, 546 S.W.3d at 698. Generally, statutes are presumed valid (presumption-of-validity), and the burden rests upon the individual challenging the statute to establish its unconstitutionality. *Rodriguez v. State*, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002). Whether a statute is facially unconstitutional is a question of law which is reviewed *de novo*. *Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013).

When interpreting a statute, courts seek to effectuate the "collective" intent or purpose of the legislators who enacted the legislation. *Hughitt v. State*, 583 S.W.3d 623, 626 (Tex. Crim. App. 2019). The challenged statute should be read as a whole, with effect given to the plain meaning of the statute's language, unless the statute is ambiguous or the plain meaning

leads to absurd results. To determine plain meaning, courts look to the statute's literal text and construe the words according to rules of grammar and usage. *Hughitt*, 583 S.W.3d at 626–27. If there is a reasonable construction that renders the statute constitutional, courts defer to that construction. *Ex parte Fisher*, 481 S.W.3d 414, 417 (Tex. App.—Amarillo 2015, pet. ref'd). If a statute is capable of two constructions, one of which sustains its validity, the court will apply the interpretation sustaining its validity. *Ex parte Granviel*, 561 S.W.2d 503, 511 (Tex. Crim. App. 1978); *Noble v. State*, No. 07-16-00105-CR, 2017 WL 4785327, at *2 (Tex. App.—Amarillo Oct. 18, 2017, pet. ref'd) (*not designated for publication*).

Argument and Authorities

Appellant's constitutional complaints challenge Sections 46.02(a–1)(2)(C) and 71.01(d) of the Texas Penal Code. Section 46.02(a–1)(2)(C) provides as follows: "A person commits an offense if the person intentionally, knowingly, or recklessly carries on or about his or her person a handgun in a motor vehicle or watercraft that is owned by the person or under the person's control at any time in which" the person is "a member of a criminal street gang, as defined by Section 71.01 of the Texas Penal Code." TEX. PENAL CODE ANN. § 46.02(a–1)(2)(C). A "criminal street gang" means "three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities." TEX. PENAL CODE ANN. § 71.01(d).

Appellant's constitutional challenges to Sections 46.02(a–1)(2)(C) and 71.01(d) implicate the proper definitions and scope of the terms "member" and "criminal street gang." The Fourteenth District Court of Appeals has already addressed the proper definitions and scope of those terms in *Ex parte Flores*, 483 S.W.3d 632 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). In *Ex parte Flores*, the appellant appealed the denial of his pretrial applications for writ of habeas corpus challenging Sections 46.02(a–1)(2)(C) and 71.01(d) of the Texas Penal Code. The court concluded that the

appellant's constitutional challenges to the terms "criminal street gang" and "member" rely on "an incorrect construction of the statute." *Ex parte Flores*, 483 S.W.3d at 637. In conducting the analysis, the court noted that "[w]hen there are different ways the statute can be construed, we apply the interpretation that sustains its validity" and that "[w]e must uphold the statute if we can determine a reasonable construction that will render it constitutional." *Id.* at 643.

The *Ex parte Flores* court first analyzed the proper construction of the term "criminal street gang." *Id.* at 643–45. The appellant argued that "[t]he three or more persons need not, in appellant's view, continuously or regularly associate in the commission of criminal activities." The court determined that the appellant relied on an incorrect construction of the statute. Three or more persons meet the definition of a criminal street gang "only when they—in addition to having a common identifying sign, a common identifying symbol, or an identifiable leadership—continuously or regularly associate in the commission of criminal activities. The statute does not apply to three or more persons solely because they have a common identifying sign or symbol." *Id.* at 644 (*internal footnote omitted*). The court rejected the appellant's argument that that interpretation is improper because it adds language to the statute because "our interpretation does not

add language; it gives the statute its proper grammatical interpretation." *Id.* The court also stated that when a statute can be construed in different ways, courts apply the interpretation that sustains its validity—which the court's construction does by giving effect to its plain language and avoiding an interpretation that would lead to an absurd result. *Id.*

The *Ex parte Flores* court next analyzed the proper construction of the term "member." *Id.* at 645. The appellant argued that "the statute punishes any member of a criminal street gang who knowingly carries a handgun in his vehicle, regardless of whether the member knows of the gang's criminal activities or carries the gun with the specific intent to further those activities." *Id.* The court determined that the argument that a defendant need not be involved in or even aware of the gang's criminal activities relied on an incorrect construction of the statute. The term "member," when read together with the definition of "criminal street gang," indicates that "a gang 'member' must be one of the three or more persons who continuously or regularly associate in the commission of criminal activities." *Id.*

Like the arguments made by the appellant in *Ex parte Flores*, Appellant suggests that the Court should apply an incorrect method of statutory construction to the language of Sections 46.02(a–1)(2)(C) and 71.01(d) in analyzing his appellate issues. He asks the Court to read Sections

46.02(a–1)(2)(C) and 71.01(d) in ways that would render them unconstitutional—in direct violation of the principles that a statute must be upheld if courts can determine a *reasonable* construction that will render it constitutional and that when there are different ways that a statute can be construed, courts apply the interpretation that sustains its validity. (*See* Appellant's Br. at 11–16). Unlike Appellant's arguments on appeal, the *Ex parte Flores* court followed the rules of statutory construction in analyzing the terms "criminal street gang" and "member" and in applying reasonable constructions of the statute to the issues on appeal.

As noted by the *Ex parte Flores* court, "the group of words 'having a common identifying sign or symbol or an identifiable leadership' is a participial phrase acting as an adjective that modified the noun 'persons.' Thus, three or more persons meet the definition of a criminal street gang only when they—in addition to having a common identifying sign, a common identifying symbol, or an identifiable leadership—continuously or regularly associate in the commission of criminal activities." *Id.* at 644; *see also Zuniga v. State*, 551 S.W.3d 729, 735 (Tex. Crim. App. 2018) (noting that to prove the "as a member of a criminal street gang" element of Section 71.02, the hypothetically correct charge "would have additionally required proof that appellant was acting as a member of a group of 'three or more persons

having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities."). And, a person is a "member" of a criminal street gang only when the gang member is "one of the three or more persons who continuously or regularly associate in the commission of criminal activities" based on reading both terms ("member" and "criminal street gang") *together as opposed to separately*, *see Ex parte Flores* at 645—as Appellant has improperly done on appeal in violation of the rules of statutory construction. (*See* Appellant's Br. at 13–14).

For the foregoing reasons, the State respectfully requests that the Court agree with and follow the Fourteenth District Court of Appeals analysis of Sections 46.02(a–1)(2)(C) and 71.01(d) in *Ex parte Flores* in interpreting Appellant's issues on appeal. Based on the proper statutory construction of Sections 46.02(a–1)(2)(C) and 71.01(d), the State will now analyze Appellant's various facial and as-applied constitutional challenges raised on appeal.

First Issue Presented
(Responsive to Appellant's First through Seventh Issues)

Appellant argues in his first through seventh issues that Section 46.02(a–1)(2)(C) of the Texas Penal Code is facially unconstitutional under the First, Second, and Fourteenth Amendments of the United States Constitution. Appellant's facial constitutional challenges have not been preserved for appellate review because Appellant did not raise any constitutional challenges to Section 46.02(a–1)(2)(C) at the trial court level. Can Appellant's facial challenges be decided on the merits when trial counsel failed to make timely and specific objections to the facial constitutionality of Section 46.02(a–1)(2)(C) at the trial court level?

I. Because Appellant's trial counsel failed to make proper and timely objections to the facial constitutionality of Section 46.02(a–1)(2)(C) at the trial court level, Appellant cannot raise his facial constitutional complaints for the first time on appeal.

One of the fundamental principles of appellate review is that complaints not timely and properly raised at trial are considered forfeited and unavailable for review on appeal. TEX. R. APP. P. 33.1(a); *Curry v. State*, 910 S.W.2d 490, 496 (Tex. Crim. App. 1995). As a prerequisite to presenting a complaint for appellate review, the record must show that the complaint was made to the trial court by a timely, specific objection, and the trial court

ruled on the objection, either expressly or implicitly. TEX. R. APP. P. 33.1(a); *Mendez v. State*, 138 S.W.3d 334, 341 (Tex. Crim. App. 2004).

Preservation of error is "a systemic requirement of every appeal." *Moore v. State*, 295 S.W.3d 329, 333 (Tex. Crim. App. 2009). This includes a facial challenge to the constitutionality of a statute. *See Karenev v. State*, 281 S.W.3d 428, 429 (Tex. Crim. App. 2009). In *Karenev*, the Court of Criminal Appeals held that a facial challenge to the constitutionality of a statute may not be raised for the first time on appeal. *Id.* at 429, 434. The Court reasoned that a facial challenge to the constitutionality of a statute is a right that can be waived and that "[s]tatutes are presumed to be constitutional until it is determined otherwise." *Id.* at 434.

Appellant raises several facial constitutional challenges to Section 46.02(a–1)(2)(C) of the Texas Penal Code. Appellant alleges that Section 46.02(a–1)(2)(C) is facially unconstitutional under the following provisions of the U.S. Constitution: (1) the Equal Protection Clause by disarming lawful handgun owners; (2) the First and Fourteenth Amendments by impairing the right to association; (3) the First and Fourteenth Amendments by authorizing state action based on the doctrine of guilt by association; (4) the First and Fourteenth Amendments due to overbreadth; (5) the Due Process Clause by impairing the fundamental right to travel; (6) the Second and

Fourteenth Amendments; and (7) the Due Process Clause due to vagueness. (Appellant's Br. at 16–35). But, Appellant did not raise any constitutional challenges at the trial court level. Due to Appellant's "failure" to raise any facial constitutional challenge to the validity of Section 46.02(a–1)(2)(C) at the trial court level, Appellant may not raise his facial constitutional challenges for the first time on appeal. *See, e.g., Karenev*, 281 S.W.3d at 434; *Runningwolf v. State*, 317 S.W.3d 829, 839–40 (Tex. App.—Amarillo 2010), *aff'd*, 360 S.W.3d 490 (Tex. Crim. App. 2012); *Keenum v. State*, No. 07-16-00111-CR, 2017 WL 3045839, at *1 (Tex. App.—Amarillo July 14, 2017, pet. ref'd) (*not designated for publication*); *McKinney v. State*, Nos. 07-15-00116-CR, 07-16-00061-CR, 07-16-00062-CR, 07-16-00063-CR, 07-16-00064-CR, 2016 WL 735954, at *2 (Tex. App.—Amarillo Feb. 18, 2016, pet. ref'd) (*not designated for publication*); *Almaguer v. State*, No. 07-10-0283-CR, 2011 WL 291973, at *1 (Tex. App.—Amarillo Jan. 31, 2011, no pet.) (*not designated for publication*); *cf. Smith v. State*, 463 S.W.3d 890, 895–96 (Tex. Crim. App. 2015) (finding that *once a penal statute has been declared unconstitutional*, a conviction pursuant to that statute is void *ab initio* and may be challenged on facial unconstitutionality grounds for the first time on appeal).

III. Conclusion

Appellant raises seven different facial constitutionality challenges to Section 46.02(a–1)(2)(C) in his first seven issues on appeal. Yet, Appellant did not allege any facial challenges to the constitutionality of Section 46.02(a–1)(2)(C) at the trial court level. Due to the lack of a timely and specific objection to the facial constitutionality of Section 46.02(a–1)(2)(C) at the trial court level, Appellant's facial challenges to the constitutionality of the statute cannot be considered for the first time on appeal.

Appellant's first through seventh issues should be overruled.

Second Issue Presented
(Responsive to Appellant's First Issue)

Appellant argues in his first issue that Section 46.02(a–1)(2)(C) is facially unconstitutional under the Fourteenth Amendment's Equal Protection Clause. Section 46.02(a–1)(2)(C) does not make distinctions based on race, alienage, or national origin, nor does it impinge on personal rights protected by the Constitution, and therefore is only required to be rationally related to a legitimate state interest. There is a rational basis for preventing members of criminal street gangs from carrying handguns in their vehicles because the State has a compelling interest in ensuring the safety of its citizens by eliminating gang violence and other criminal activities. Does Section 46.02(a–1)(2)(C) make distinctions based on race, alienage, or national origin, or impinge on personal rights protected by the Constitution?

I. Equal Protection Clause of the Fourteenth Amendment.

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV § 1. The Equal Protection Clause dictates that "all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). The general rule is that "legislation is presumed to be valid and will be

sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Id.* at 440. When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude. The general rule gives way, however, when a statute classifies by race, alienage, or national origin. These laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest. Similar oversight is due when state laws impinge on personal rights protected by the Constitution. *Id.*

II. Section 46.02(a–1)(2)(C) does not make distinctions based on race, alienage, or national origin, nor does it impinge on personal rights protected by the Constitution.

Appellant argues that Section 46.02(a–1)(2)(C) denies Appellant the equal protection of the laws because "certain law-abiding handgun owners are treated differently than other law-abiding handgun owners based solely on the owner's association with a particular group disfavored by law enforcement." (Appellant's Br. at 17). Contrary to Appellant's contention, Section 46.02(a–1)(2)(C) does not treat people differently "based solely on the owner's association with a particular group disfavored by law enforcement."

Section 46.02(a–1)(2)(C) prohibits a member of a criminal street gang from intentionally, knowingly, or recklessly carrying on or about his or her

person a handgun in a motor vehicle that is owned by the person or under the person's control. TEX. PENAL CODE ANN. § 46.02(a–1)(2)(C). To violate Section 46.02(a–1)(2)(C), a person must be an "actual member[] in a criminal street gang." *Ex parte Flores*, 483 S.W.3d at 646. The term "member" refers to "one of the three or more persons who—in addition to having a common identifying sign, a common identifying symbol, or an identifiable leadership—continuously or regularly associate in the commission of criminal activities." *Id.*

Section 46.02(a–1)(2)(C) does not implicate the Equal Protection Clause of the Fourteenth Amendment. Section 46.02(a–1)(2)(C) does not make distinctions based on race, alienage, or national origin, nor does it impinge on personal rights protected by the Constitution—as will be discussed further in this brief. And, the statute does not treat "certain law-abiding handgun owners" differently than "other law-abiding handgun owners" since the State has a legitimate interest in suppressing criminal street gangs. (Appellant's Br. at 17); *see generally Ex parte Flores*, 483 S.W.3d at 641 (noting that the State "has a compelling interest in ensuring the safety of its citizens by eliminating gang violence and other criminal activities"); *People v. Hernandez*, 134 Cal.App.4th 474, 481–82 (Cal. App. 2005) (finding that a statute imposing enhanced penalties on aider and

abettor of murder with firearm use committed for benefit of criminal street gang does not violate equal protection, even though aiders and abettors of firearm murders committed for benefit of other dangerous associations are not subject to same enhanced term, because the Legislature has a legitimate interest in suppressing criminal street gangs, and it is not obliged to extend its regulation to all cases which it might possibly reach); *People v. Gonzales*, 87 Cal.App.4th 1, 13 (Cal. App. 2001) (finding that aiders and abettors of gang member who used firearm to commit murder were not similarly situated to aiders and abettors of firearm users not members of criminal street gangs as the defendants' actions were undertaken for purpose of promoting and furthering their street gang in its criminal conduct).

III. Section 46.02(a–1)(2)(C) does not violate the Equal Protection Clause under a rational basis standard of review.

Since Section 46.02(a–1)(2)(C) does not make distinctions based on race, alienage, or national origin, or impinge on personal rights protected by the Constitution, the statute is subject to a rational basis standard of review. *See Estes*, 546 S.W.3d at 697 (noting that when a state action does not classify by race, alienage, or national origin, or impinge on personal rights protected by the Constitution, the state action is presumed to be valid and will be upheld if it is but rationally related to a legitimate state interest). The Court of Criminal Appeals determined in *Roy v. State* that Section 46.02

does not deny equal protection of the law. The court said that "[w]e can easily perceive a rational basis for limiting the class of persons authorized to carry certain weapons. Indeed, the fact that not all citizens may do so is the necessary result of the exercise of the legislative power to prevent crime." *Roy v. State*, 552 S.W.2d 827, 830 (Tex. Crim. App. 1977), *overruled in part on other grounds by Johnson v. State*, 650 S.W.2d 414 (Tex. Crim. App. 1983). While the *Roy* case pre-dates the enactment of the "criminal street gang" provision of Section 46.02 (since Section 46.02(a–1)(2)(C) was not enacted until 2007), the *Roy* court's reasoning is still sound. There is a rational basis for preventing members of criminal street gangs from carrying handguns in their vehicles. The statute regulates "the secondary effect of gun violence by gang members[.] . . . The State has a compelling interest in ensuring the safety of its citizens by eliminating gang violence and other criminal activities." *Ex parte Flores*, 483 S.W.3d at 641.

Section 46.02(a–1)(2)(C) does not violate Appellant's right to equal protection of the laws. Appellant argues that "[t]he State action of arresting lawful handgun owners who are merely associated with a scorned group is not rationally related to the State interest in disarming criminals." (Appellant's Br. at 18). But, Section 46.02(a–1)(2)(C) does not prohibit the carrying of a firearm from any person who is "merely associated with a

scorned group." The statute specifically applies only to a person who is an "actual member[] in a criminal street gang." *Ex parte Flores* at 646. Under the proper statutory interpretation of the statute, Section 46.02(a–1)(2)(C) does not distinguish between "similarly situated persons" because it only applies to a person who continuously or regularly associates in the commission of criminal activities.

IV. Conclusion.

Section 46.02(a–1)(2)(C) is subject to a rational basis standard of review because it does not make distinctions based on race, alienage, or national origin, nor does it impinge on personal rights protected by the Constitution. There is a rational basis for preventing members of criminal street gangs from carrying handguns in their vehicles because the State has a compelling interest in ensuring the safety of its citizens by eliminating gang violence and other criminal activities.

Appellant's first issue should be overruled.

Third Issue Presented
(Responsive to Appellant's Second and Third Issues)

Appellant argues in his second and third issues that Section 46.02(a–1)(2)(C) is facially unconstitutional under the First and Fourteenth Amendments because it impairs the right of association and authorizes state action based on the doctrine of guilt by association. Section 46.02(a–1)(2)(C) does not implicate the constitutional right to freedom of association because it does not address family relationships and does not prevent gang members from gathering to engage in any activities protected by the First Amendment. Section 46.02(a–1)(2)(C) also does not create guilt by association because a person is not considered to be a member of a criminal street gang simply by being associated with an association or group that has three or more members who continuously or regularly associate in the commission of criminal activities. Does Section 46.02(a–1)(2)(C) impair the right of association or authorize state action based on the doctrine of guilt by association?

I. First Amendment Right to Freedom of Association.

The First Amendment protects freedom of association in two distinct contexts. First, it protects "intimate human relationships [that] must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our

constitutional scheme." *Roberts v. United States Jaycees*, 468 U.S. 609, 617–18 (1984). These types of relationships are "those that attend the creation and sustenance of a family." *Id.* at 619. Second, it protects "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Id.* at 618. Implicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with others "in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Id.* at 622. The right of "expressive association," however, does not provide generalized protection for "social association." *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989).

II. Section 46.02(a–1)(2)(C) does not implicate Appellant's right to freedom of association or authorize state action based on the doctrine of guilt by association.

Appellant argues that Section 46.02(a–1)(2)(C) interferes with the fundamental First Amendment right to freedom of association. He says that "the statutory definition of 71.01(d) criminalizes Appellant's status as a member of his motorcycle club." (Appellant's Br. at 22). He also says that "[a]nybody who is a member of any group falling within its definition is a presumptive criminal, his rights determined purely by his status as a

member of an association disapproved by law enforcement." (Appellant's Br. at 24).

Section 46.02(a–1)(2)(C) does not implicate Appellant's right to freedom of association. The statute neither addresses family relationships nor prevents gang members from gathering to engage in any activities protected by the First Amendment. Rather, Section 46.02(a–1)(2)(C) "prevents people from carrying handguns in their vehicles—an activity that, as explained earlier, does not convey a particular message—if they also regularly associate in committing criminal activities." *Ex parte Flores*, 483 S.W.3d at 642. The statute is specifically targeted at "people whose possession of a handgun in a vehicle is more likely to lead to violent secondary effects." *Id.* at 641. The statute does not prohibit the right to association because "a person can avoid the statute's incidental limits on use of identifying signs or symbols [of criminal street gang membership] simply by not carrying a handgun in a vehicle, which confirms that the statute's focus is not on suppressing expression." *Id.*

Furthermore, Section 46.02(a–1)(2)(C) does not "act as an unconstitutional statutory codification of guilt by association." (Appellant's Br. at 22). It is axiomatic that "guilt by association is a philosophy alien to the traditions of a free society." *N.A.A.C.P. v. Claiborne Hardware Co.*, 458

U.S. 886, 932 (1982). But, a person is not considered to be a member of a "criminal street gang" simply by being associated with an association or group that has three or more members who continuously or regularly associate in the commission of criminal activities. *See Ex parte Flores* at 645 (noting that a gang member "must be one of the three or more persons who continuously or regularly associate in the commission of criminal activities.").

III. Conclusion.

Section 46.02(a–1)(2)(C) does not implicate the constitutional right to freedom of association because it does not address family relationships and does not prevent gang members from gathering to engage in any activities protected by the First Amendment. Likewise, Section 46.02(a–1)(2)(C) also does not create guilt by association because a person is not considered to be a member of a criminal street gang simply by being associated with an association or group that has three or more members who continuously or regularly associate in the commission of criminal activities.

Appellant's second and third issues should be overruled.

Fourth Issue Presented
(Responsive to Appellant's Fourth Issue)

Appellant argues in his fourth issue that Section 46.02(a–1)(2)(C) of the Texas Penal Code is facially unconstitutional because the statute is substantially overbroad. Section 46.02(a–1)(2)(C) is only subject to intermediate scrutiny as opposed to strict scrutiny because it regulates not the direct impact of viewing identifying signs, but the secondary effect of gun violence by gang members who sometimes use such signs. The statute survives intermediate scrutiny because it does not regulate his "cut," but rather regulates the secondary effect of gun violence by gang members. Does Section 46.02(a–1)(2)(C) regulate content-based expression in such a manner that the statute is substantially overbroad?

I. First Amendment Overbreadth Doctrine.

Overbreadth is a First Amendment doctrine that allows a facial challenge to a statute even though the statute might have some legitimate applications. The overbreadth of a statute

> must be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep. To be overbroad, a statute must prohibit a substantial amount of protected expression, and the danger that the statute will be applied in an unconstitutional manner must be realistic and not based on fanciful hypotheticals. The person challenging the statute must demonstrate from its text and from actual fact that a substantial number of instances exist in which the statute cannot be applied constitutionally.

Ex parte Ingram, 533 S.W.3d 887, 894 (Tex. Crim. App. 2017) (*internal footnotes and quotations omitted*). The first step in an overbreadth analysis is to construe the challenged statute. The statute must be construed in accordance with the plain meaning of its text unless the language is ambiguous or the plain meaning leads to absurd results that the Legislature could not possibly have intended. *Id.*

II. Section 46.02(a–1)(2)(C) is only subject to intermediate scrutiny since it is justified without reference to the content of the expression.

Appellant argues that Section 46.02(a–1)(2)(C) is subject to strict scrutiny because it allegedly regulates speech. (Appellant's Br. at 27). In *Ex parte Flores*, the Fourteenth District Court of Appeals determined that the statute is only subject to intermediate scrutiny because

> it is far from clear that this statute regulates handgun possession in a vehicle based on the message expressed by this sign or symbol, particularly given that the sign or symbol need not be used in connection with the gun possession (and may not be used at all if the group has an identifiable leadership.). Nor does the statute appear to draw a content-based distinction between different categories of signs or symbols that are sufficiently communicative to be protected by the First Amendment. Instead, it draws a communication-based distinction, covering any common (i.e., shared) sign or symbol that is "identifying."

Ex parte Flores, 483 S.W.3d at 640. The court stated that it was unnecessary to determine whether the statute was content-based because "the reference to such signs or symbols is part of a criminal statute regulating handgun

possession in vehicles. . . . If the regulation is aimed at the '*secondary effects*' that tend to accompany such expression, so that it is '*justified* without reference to the content' of the expression, the regulation will be subject to intermediate scrutiny." *Id.* at 640–41.

The *Ex parte Flores* court determined that Section 46.02(a–1)(2)(C) "falls into this category because it is regulating not the direct impact of viewing identifying signs, but the secondary effect of gun violence by gang members who sometimes use such signs. The State has a compelling interest in ensuring the safety of its citizens by eliminating gang violence and other criminal activities. The justification of controlling such violence is unrelated to any message likely to be expressed by identifying signs." *Id.* at 641 (*internal citation omitted*). In addition, "a person can avoid the statute's incidental limits on use of identifying signs or symbols simply by not carrying a handgun in a vehicle, which confirms that the statute's focus is not on suppressing expression." *Id.*

III. Section 46.02(a–1)(2)(C) survives intermediate scrutiny because the statute does not regulate his "cut."

Appellant argues that Sections 46.02(a–1)(2)(C) and 71.01(d) are substantially overbroad because they "reach[], like a drone to target, constitutionally protected free expression of every vehicular traveler who is also a member of any group singled out by police." (Appellant's Br. at 26).

He also argues that "Appellant expresses his membership by wearing his cut (jacket or vest with the motorcycle club's insignia) while operating his motorcycle in much the same way a person may express himself with a bumper sticker or other logo." (Appellant's Br. at 26). But, for the foregoing reasons, Section 46.02(a–1)(2)(C) is only subject to intermediate scrutiny as opposed to strict scrutiny.

Section 46.02(a–1)(2)(C) survives intermediate scrutiny because it does not regulate his "cut." Instead, the statute regulates the "secondary effect of gun violence by gang members who sometimes use such signs [and symbols]. The State has a compelling interest in ensuring the safety of its citizens by eliminating gang violence and other criminal activities. The justification of controlling such violence is unrelated to any message likely to be expressed by identifying signs [and symbols]." *Ex parte Flores* at 641 (*internal citation omitted*). Furthermore, Section 46.02(a–1)(2)(C)

> does not provide law enforcement with unfettered discretion to arrest individuals or otherwise authorize and encourage arbitrary and discriminatory enforcement. Moreover, law enforcement may not arrest a person under this section merely because they recognize gang signs or symbols. Instead, law enforcement must also determine whether the person is carrying a handgun in a vehicle and whether he or she continuously or regularly associates in the commission of criminal activity.

Ex parte Flores at 647.

IV. Conclusion.

Section 46.02(a–1)(2)(C) is not substantially overbroad. The statute is aimed at the secondary effects of gun violence by gang members that accompany use of such expressive content as his "cut," but is justified without reference to the content of the expression and therefore is only subject to intermediate scrutiny. The statute survives intermediate scrutiny because it does not regulate his "cut," but rather regulates the secondary effect of gun violence by gang members.

Appellant's fourth issue should be overruled.

Fifth Issue Presented
(Responsive to Appellant's Fifth Issue)

Appellant argues in his fifth issue that Section 46.02(a–1)(2)(C) of the Texas Penal Code is facially unconstitutional because it violates the constitutional right to travel under the Fourteenth Amendment's Due Process Clause. Section 46.02(a–1)(2)(C) only applies to a "member" of a criminal street gang who continuously or regularly associates with three or more persons in the commission of criminal activities. Once the statute is properly interpreted, it does not deprive Appellant of the right to travel because it does not deter such travel, impede travel as its primary objective, or use any classification which serves to penalize the exercise of that right. Does Section 46.02(a–1)(2)(C) deprive Appellant, as a "member" of a criminal street gang, of the constitutional right to travel?

I. Constitutional Right to Travel.

The constitutional right to travel from one state to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of the Federal Union. *U.S. v. Guest*, 383 U.S. 745, 757 (1966). Freedom to travel throughout the United States has long been recognized as a basic right under the Constitution. *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972). The constitutional right to travel is implicated only when a state law actually

deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right. *Att'y Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 903 (1986); *Ex parte Robinson*, 80 S.W.3d 709, 715 (Tex. App.—Houston [1st Dist.] 2002), *aff'd*, 116 S.W.3d 794 (Tex. Crim. App. 2003).

II. Section 46.02(a–1)(2)(C) only applies to a "member" of a criminal street gang who continuously or regularly associates with three or more persons in the commission of criminal activities.

Appellant argues that Section 46.02(a–1)(2)(C) violates his constitutional right to travel. Appellant says that the statute "criminalizes any travel by a citizen, otherwise lawfully carrying a handgun, who is a member of any disfavored group, regardless of any personal crime attributable to the traveler himself" and that "[t]he statutory framework at issue in this appeal applies to any group and to all its members." (Appellant's Br. at 30–31).

Appellant's argument that Section 46.02(a–1)(2)(C) inhibits his right to travel due to the "specific assumption that the traveler shares the *mens rea* of some members of his disfavored group" (Appellant's Br. at 31) is based on an incorrect reading of the statute. *Ex parte Flores* determined that "three or more persons meet the definition of a criminal street gang only when they—in addition to having a common identifying sign, a common

identifying symbol, or an identifiable leadership—continuously or regularly associate in the commission of criminal activities. The statute does not apply to three or more persons solely because they have a common identifying sign or symbol." *Ex parte Flores*, 483 S.W.3d at 644 (*internal footnote omitted*). A gang "member" must be "one of the three or more persons who continuously or regularly associate in the commission of criminal activities." *Id.* at 645. The statute "does not apply to those with a common identifying leadership when only the leadership continuously or regularly associates in the commission of criminal activities. Rather, the term 'member' refers to one of the three or more persons who—in addition to having a common identifying sign, a common identifying symbol, or an identifiable leadership—continuously or regularly associate in the commission of criminal activities." *Id.* at 646. When properly interpreted, Section 46.02(a–1)(2)(C) does not "criminalize[] any travel by a citizen, otherwise lawfully carrying a handgun, who is a member of any disfavored group, regardless of any personal crime attributable to the traveler himself." (Appellant's Br. at 30).

III. Section 46.02(a–1)(2)(C) does not deprive Appellant of the fundamental right to travel.

Appellant has not been denied the constitutional right to travel. Section 46.02(a–1)(2)(C) does not do any of the following: (1) deter such travel; (2)

impede travel as its primary objective; or (3) use any classification which serves to penalize the exercise of that right.

First, the statute does not deter such travel because it does not prohibit Appellant from traveling in any mode of transportation that he should so choose. He remains free to travel unrestricted to points within or outside of Texas. The only restriction that the statute imposes on him is that Appellant—as a "member" of a "criminal street gang"—may not carry a firearm in his vehicle while he is on his travels. *See Ex parte Flores*, 483 S.W.3d at 640 (noting that while the group of persons that the statute prohibits from carrying handguns in vehicles may be defined in part by whether that group has a common identifying sign or symbol, it is far from clear that the statute regulates handgun possession in a vehicle based on the message expressed by the sign or symbol, particularly given that the sign or symbol need not be used in connection with the gun possession). At most, Appellant has demonstrated an indirect burden on his right to travel. A minor restriction on Appellant's right to travel does not deny him his fundamental right to travel. *Cramer v. Skinner*, 931 F.2d 1020, 1031 (5th Cir. 1991).

Second, the statute does not impede travel as its primary objective. Section 46.02(a–1)(2)(C) "regulat[es] not the direct impact of viewing

identifying signs, but the secondary effect of gun violence by gang members who sometimes use such signs." *Ex parte Flores* at 641. The justification of controlling such violence is unrelated to any message likely to be expressed by identifying signs. *Id.* Put another way, "the identifying content of a common sign is relevant under the statute not because the State disagrees with that content, but because the sign identifies those people whose possession of a handgun in a vehicle is more likely to lead to violent secondary effects. In addition, a person can avoid the statute's incidental limits on use of identifying signs or symbols simply by not carrying a handgun in a vehicle, which confirms that the statute's focus is not on suppressing expression." *Id.* As shown from the foregoing, the statute does not impede travel as its primary objective since the focus of the statute is not on impeding or impacting travel at all, but rather to protect the welfare of citizens of the State of Texas by addressing gun violence committed by criminal gang members.

Finally, the statute does not use any classification which serves to penalize the exercise of that right. Section 46.02(a–1)(2)(C) does not *penalize* the exercise of the right to travel. The statute penalizes the possession of a handgun in a motor vehicle by a member of a criminal street gang, not the right to travel. The Constitution "protects the right to travel,

not the right to travel armed." *N.Y. State Rifle & Pistol Ass'n, Inc. v. City of N.Y.*, 883 F.3d 45, 67 (2d Cir. 2018), *cert. granted*, 139 S.Ct. 939 (2019).

IV. Conclusion.

Section 46.02(a–1)(2)(C) does not violate the constitutional right to travel for the reasons shown above. Furthermore, the statute rationally advances legitimate public safety ends by addressing gun violence committed by criminal gang members.

Appellant's fifth issue should be overruled.

Sixth Issue Presented
(Responsive to Appellant's Sixth Issue)

Appellant argues in his sixth issue that Section 46.02(a–1)(2)(C) of the Texas Penal Code is facially unconstitutional because it deprives Appellant of his Second Amendment right to possess a handgun. Section 46.02(a–1)(2)(C) does not violate Appellant's Second Amendment rights because the right to keep and bear arms is not unlimited. Section 46.02(a–1)(2)(C) serves a compelling interest in ensuring the safety of Texas citizens by eliminating gang violence and other criminal activities. Does Section 46.02(a–1)(2)(C) deprive Appellant, as a "member" of a criminal street gang, of his Second Amendment right to keep and bear arms?

I. Second Amendment Right to Keep and Bear Arms.

The Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). While the Second Amendment conferred an individual right to keep and bear arms, "the right was not unlimited." *Id.* at 595. Like most rights, "the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626. Nothing in the *Heller* opinion "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626–27; *accord McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 786 (2010). Furthermore, it was stated in *Heller* that the above prohibitions are listed "only as examples; our list does not purport to be exhaustive." *Heller* at 627 n. 26.

II. Section 46.02(a–1)(2)(C) does not violate Appellant's Second Amendment rights.

Appellant argues that Section 46.02(a–1)(2)(C) interferes with the fundamental Second Amendment right to carry a handgun for defensive purposes. (Appellant's Br. at 31–32). He says that "Texas passed a law that effectuated a lawful handgun owner's constitutional right to carry a handgun for defensive purposes, clarifying that the right extends to one's own vehicle," but that Section 46.02(a–1)(2)(C) "denies handgun owners their right to travel and to carry their handguns at the same time." (Appellant's Br. at 32).

Section 46.02(a–1)(2)(C) does not violate Appellant's Second Amendment rights. The Court of Criminal Appeals held in *Roy v. State* that Section 46.02 is not violative of the constitutional right to keep and bear arms. *Roy*, 552 S.W.2d at 830. While the *Roy* case pre-dates *Heller* (and addressed Article I, § 23 of the Texas Constitution rather than the Second Amendment), the *Heller* opinion did not overrule prior decisions that determined that the Second Amendment right to keep and bear arms was not unlimited. To the contrary, *Heller* expressly stated that nothing in the opinion "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill." *Heller* at 626. Similar to the necessity for prohibiting felons from possessing firearms, Section 46.02(a–1)(2)(C) regulates "the secondary effect of gun violence by gang

members who sometimes use such signs. The State has a compelling interest in ensuring the safety of its citizens by eliminating gang violence and other criminal activities." *Ex parte Flores*, 483 S.W.3d at 641.

The *Ex parte Flores* court's observations about gang violence and other criminal activities committed by criminal street gangs is consistent with scholarly research on gangs. The National Drug Intelligence Center stated in 2011 that criminal gangs remain in control of most of the retail distribution of drugs throughout much of the United States, particularly in major and midsize cities. Nat'l Drug Intell. Ctr., U.S. Dep't of Justice, *National Drug Threat Assessment:* 2011, at 11 (Aug. 2011). Gangs use the threat of violence to suppress competition. *See* Scott H. Decker & Barrick Van Winkle, *Life in the Gang: Family, Friends and Violence* 163–64 (1996). The need to control identifiable turf in order to limit competition necessitates the use of violence and intimidation tactics. *See id.* Not surprisingly, rates of violent crime among gang members are high. Randall D. Shelden, Sharon K. Tracy & William B. Brown, *Youth Gang in American Society* 98–101 (2d ed. 2001). Gang-related homicide has distinctive characteristics: it is more likely to be committed in public, involve strangers, multiple participants, and firearms. *See* James C. Howell, *Youth Gang Homicide: A Literature Review*, 45 Crime & Delinq. 208, 210–12 (1999). Given the high rates of violent crime among

gang members and gangs' penchant for using firearms to commit violent crime, the State has a compelling interest in prohibiting a "member" of a criminal street gang from carrying on or about his or her person a handgun in a motor vehicle.

Appellant states that he is forced to choose between his right to travel and his right to carry, "when law guaranteed both rights, including the right to exercise them simultaneously." (Appellant's Br. at 32). But, as a member of a "criminal street gang," Appellant does not have a Second Amendment right to carry a handgun in a motor vehicle. *See Heller*, 554 U.S. at 626–27; *U.S. v. Anderson*, 559 F.3d 348, 352 (5th Cir. 2009); *see also U.S. v. Bryant*, 711 F.3d 364, 370 (2d Cir. 2013) (finding that the defendant's conviction for the unlawful possession of a firearm in furtherance of a drug trafficking crime did not violate the defendant's Second Amendment right to possess a firearm for self-defense in his home); *U.S. v. Booker*, 644 F.3d 12, 25–26 (1st Cir. 2011) (finding that the prohibition on a defendant convicted of a "misdemeanor crime of domestic violence" from possessing, shipping, or receiving firearms substantially promoted an important government interest in preventing domestic gun violence and therefore did not violate the Second Amendment); *U.S. v. Seay*, 620 F.3d 919, 924–25 (8th Cir. 2010) (finding

that the prohibition on drug abusers, "a dangerous class of individuals," from possessing a firearm is not unconstitutional under the Second Amendment).

III. Conclusion.

Section 46.02(a–1)(2)(C) does not violate Appellant's Second Amendment rights because the right to keep and bear arms is not unlimited. Section 46.02(a–1)(2)(C) serves a compelling interest in ensuring the safety of Texas citizens by eliminating gang violence and other criminal activities. As a member of a "criminal street gang," Appellant does not have a Second Amendment right to carry a handgun in a motor vehicle.

Appellant's sixth issue should be overruled.

Seventh Issue Presented
(Responsive to Appellant's Seventh Issue)

Appellant argues in his seventh issue that Section 46.02(a–1)(2)(C) of the Texas Penal Code is facially unconstitutional because the statute is unconstitutionally vague. To pass constitutional muster, a law that imposes criminal liability must be sufficiently clear: (1) to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited; and (2) to establish determinate guidelines for law enforcement. Section 46.02(a–1)(2)(C) is not void for vagueness because the terms "criminal street gang" and "member," when properly construed, removes any ambiguity in the terms and clarifies what conduct makes an individual a member of a criminal street gang. Is Section 46.02(a–1)(2)(C) void for vagueness based on a proper reading of the terms "member" and "criminal street gang?"

I. Void for Vagueness Doctrine.

It is a basic principle of due process that a statute is void for vagueness if its prohibitions are not clearly defined. The void-for-vagueness doctrine "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not permit arbitrary and discriminatory enforcement. Although a statute is not impermissibly vague because it fails to define words or phrases, it is invalid if it fails to give a person of ordinary

intelligence a reasonable opportunity to know what conduct is prohibited." *State v. Holcombe*, 187 S.W.3d 496, 499 (Tex. Crim. App. 2006) (*internal footnotes omitted*).

To pass constitutional muster, a law that imposes criminal liability must be sufficiently clear: "(1) to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and (2) to establish determinate guidelines for law enforcement." *State v. Doyal*, __S.W.3d__, No. PD-0254-18, 2019 WL 944022, at *5 (Tex. Crim. App. Feb. 27, 2019) (*designated for publication*). What renders a statute vague is the indeterminacy of precisely what the prohibited conduct is. *Id.* at *5. In construing whether a law is vague, the statute should be interpreted in accordance with its plain meaning unless the language is ambiguous or the plain meaning leads to absurd results. *Sanchez v. State*, 995 S.W.2d 677, 683 (Tex. Crim. App. 1999).

II. Section 46.02(a–1)(2)(C) is not void for vagueness based on the definitions of "member" and "criminal street gang."

Appellant argues that Section 46.02(a–1)(2)(C) is void for vagueness due to the definition of "criminal street gang." Appellant says that the statute invites arbitrary and discriminatory enforcement of the law due to the definition of "criminal street gang" in Section 71.01(d). (Appellant's Br. at

33–35). He also says that "[s]tate action could not be more arbitrary or its administration more cherry-picked." (Appellant's Br. at 34).

"Criminal street gang" is defined as "three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities." TEX. PENAL CODE ANN. § 71.01(d). Appellant believes that the "Rotarians, Lions, Catholics, Republicans, or Democrats" would fall under the definition of "criminal street gang" because each have three or more felons in its respective membership. (Appellant's Br. at 33–34). Appellant relies upon a grossly inaccurate interpretation of "criminal street gang" in making that argument.

A correct construction of the statute removes any ambiguity in the term "criminal street gang" and clarifies what conduct makes an individual a "member" of the gang. Three or more people meet the definition of a "criminal street gang" *only* when they, in addition to having a common identifying sign, a common identifying symbol, or an identifiable leadership, "continuously or regularly associate in the commission of criminal activities." *Ex parte Flores*, 483 S.W.3d at 644. A gang "member" refers to "one of the three or more persons who—in addition to having a common identifying sign, a common identifying symbol, or an identifiable

leadership—continuously or regularly associate in the commission of criminal activities." *Ex parte Flores* at 646. So understood, the terms "criminal street gang" and "member" are not so vague that persons of common intelligence must necessarily guess at what conduct is prohibited because "a correct construction of the statute removes any ambiguity in the term 'criminal street gang' and clarifies what conduct makes an individual a 'member' of the gang." *Id.* at 647.

For the same reasons as expressed in *Ex parte Flores*, Section 46.02(a–1)(2)(C) does not provide law enforcement with unfettered discretion to arrest individuals or otherwise authorize arbitrary and discriminatory enforcement. *Ex parte Flores* at 647. A correct construction of the statute demonstrates that it is "sufficiently clear to afford a person of ordinary intelligence a reasonable opportunity to know what is prohibited" and "establishes determinate guidelines for law enforcement." *Id.* at 648. Furthermore, "law enforcement cannot 'decide arbitrarily which members of the public' will be subject to the statute." *Id.*

III. Conclusion.

Section 46.02(a–1)(2)(C) is not void for vagueness because it provides a person of ordinary intelligence a reasonable opportunity to know what is prohibited and establishes determinate guidelines for law enforcement.

Contrary to Appellant's contention, a "criminal street gang" is not "any identifiable group who has three or more misdemeanants." (Appellant's Br. at 33). Three or more people meet the definition of a "criminal street gang" *only* when they, in addition to having a common identifying sign, a common identifying symbol, or an identifiable leadership, continuously or regularly associate in the commission of criminal activities. A gang "member" refers to one of the three or more persons who—in addition to having a common identifying sign, a common identifying symbol, or an identifiable leadership—continuously or regularly associate in the commission of criminal activities. So understood, the terms "criminal street gang" and "member" are not so vague that persons of common intelligence must necessarily guess at what conduct is prohibited.

Appellant's seventh issue should be overruled.

Eighth Issue Presented
(Responsive to Appellant's Eighth through Fourteenth Issues)

Appellant argues in his eighth through fourteenth issues that Section 46.02(a–1)(2)(C) of the Texas Penal Code is unconstitutional as applied to him under the First, Second, and Fourteenth Amendments of the United States Constitution. Appellant's as-applied constitutional challenges have not been preserved for appellate review because Appellant did not raise any constitutional challenges to Section 46.02(a–1)(2)(C) at the trial court level. Can Appellant's as-applied challenges be decided on the merits when Appellant failed to make timely and specific objections to the constitutionality of Section 46.02(a–1)(2)(C), as applied to him, at the trial court level?

I. Because Appellant's trial counsel failed to make proper and timely objections to the constitutionality of Section 46.02(a–1)(2)(C), as applied to Appellant, at the trial court level, Appellant cannot raise his as-applied constitutional complaints for the first time on appeal.

One of the fundamental principles of appellate review is that complaints not timely and properly raised at trial are considered forfeited and unavailable for review on appeal. TEX. R. APP. P. 33.1(a); *Curry*, 910 S.W.2d at 496. As a prerequisite to presenting a complaint for appellate review, the record must show that the complaint was made to the trial court by a timely, specific objection, and the trial court ruled on the objection,

either expressly or implicitly. TEX. R. APP. P. 33.1(a); *Mendez*, 138 S.W.3d at 341.

Preservation of error is "a systemic requirement of every appeal." *Moore*, 295 S.W.3d at 333. This includes an "as applied" challenge to the constitutionality of a statute. *See, e.g., Curry*, 910 S.W.2d at 496; *Garcia v. State*, 887 S.W.2d 846, 861 (Tex. Crim. App. 1994). In *Curry*, the Court of Criminal Appeals determined that the appellant's as-applied constitutional challenges were not properly preserved for appellate review because there was no evidence in the record that the appellant raised the as-applied challenges at trial. *Curry*, 910 S.W.2d at 496. Likewise, in *Garcia*, the Court of Criminal Appeals determined that the appellant's as-applied constitutional challenges were not properly preserved for appellate review because no objection was raised or any motion made at trial concerning the constitutional operation of the statute as it pertained to the appellant. *Garcia*, 887 S.W.2d at 861.

Appellant raises several as-applied constitutional challenges to Section 46.02(a–1)(2)(C) of the Texas Penal Code. Appellant alleges that Section 46.02(a–1)(2)(C) is unconstitutional as applied to Appellant under the following provisions of the U.S. Constitution: (1) the Equal Protection Clause by disarming lawful handgun owners; (2) the First and Fourteenth

Amendments by impairing the right to association; (3) the First and Fourteenth Amendments by authorizing state action based on the doctrine of guilt by association; (4) the First and Fourteenth Amendments due to overbreadth; (5) the Due Process Clause by impairing the fundamental right to travel; (6) the Second and Fourteenth Amendments; and (7) the Due Process Clause due to vagueness. (Appellant's Br. at 35–39). But, as with Appellant's facial constitutional challenges, Appellant did not raise any as-applied constitutional challenges at the trial court level. Due to Appellant's "failure" to raise any as-applied constitutional challenges to the validity of Section 46.02(a–1)(2)(C) of the Texas Penal Code at the trial court level, Appellant may not raise his as-applied constitutional challenges for the first time on appeal. *See, e.g., Curry*, 910 S.W.2d at 496; *Garcia*, 887 S.W.2d at 861; *Cartier v. State*, 58 S.W.3d 756, 759 (Tex. App.—Amarillo 2001, pet. ref'd); *Sony v. State*, 307 S.W.3d 348, 353 (Tex. App.—San Antonio 2009, no pet.); *Fluellen v. State*, 104 S.W.3d 152, 168 (Tex. App.—Texarkana 2003, no pet.).

II. Conclusion

Appellant raises seven different as-applied constitutional challenges in his eighth through fourteenth issues on appeal. Yet, Appellant did not raise any as-applied challenges to the constitutionality of Section 46.02(a–

1)(2)(C) at the trial court level. Merely questioning an officer "regarding the arbitrariness of the enforcement of the statute" is not sufficient to preserve an as-applied constitutional challenge for appellate review. *See Sony*, 307 S.W.3d at 353. Therefore, due to the lack of a timely and specific objection to the constitutionality of Section 46.02(a–1)(2)(C), as applied to Appellant, at the trial court level, Appellant's as-applied challenges to the constitutionality of the statute cannot be considered for the first time on appeal.

Appellant's eighth through fourteenth issues should be overruled.

Ninth Issue Presented
(Responsive to Appellant's Fifteenth Issue)

Appellant argues in his fifteenth issue that the evidence is legally insufficient to show that Appellant was one of the "members" who regularly or continuously engaged in criminal activity. In assessing the sufficiency of the evidence, an appellate court views all the evidence in the light most favorable to the verdict and determines whether, based on that evidence and any reasonable inferences therefrom, a rational juror could have found the essential elements of the offense beyond a reasonable doubt. After viewing the evidence in the light most favorable to the verdict, the evidence is legally sufficient to show that Appellant qualifies as a "member" of a criminal street gang. The evidence shows that Appellant is one of three or more persons in the Cossacks Outlaw Motorcycle Gang who continuously or regularly associate in the commission of criminal activities based on his four years of membership in the Cossacks. Is the evidence legally sufficient to show that Appellant qualifies as a "member" of a criminal street gang?

I. Standard of Review.

In assessing the sufficiency of the evidence, an appellate court views all the evidence in the light most favorable to the verdict and determines whether, based on that evidence and any reasonable inferences therefrom, a rational juror could have found the essential elements of the offense beyond

a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Queeman v. State*, 520 S.W.3d 616, 622 (Tex. Crim. App. 2017). The standard requires the appellate court to defer "to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Zuniga*, 551 S.W.3d at 732 (*citing Jackson*, 443 U.S. at 319). The jury is "the sole judge of the credibility of witnesses and the weight to be given to their testimonies, and the reviewing court must not usurp this role by substituting its own judgment for that of the jury." *Queeman*, 520 S.W.3d at 622. Juries are permitted to draw multiple reasonable inferences from facts, as long as each is supported by the evidence presented at trial. *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013).

The standard of review is the same in both direct and circumstantial evidence cases. Direct evidence and circumstantial evidence "are equally probative, and circumstantial evidence alone may be sufficient to uphold a conviction so long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction." *Zuniga*, 551 S.W.3d at 733. In conducting this review, an appellate court considers all evidence in the record, whether it was admissible or inadmissible. *Winfrey v. State*, 393 S.W.3d 763, 767 (Tex. Crim. App. 2013). The duty of the reviewing court

> is simply to ensure that the evidence presented supports the jury's verdict and that the State has presented a legally sufficient case of the offense charged. When the reviewing court is faced with a record supporting contradicting inferences, the court must presume that the jury resolved any such conflicts in favor of the verdict, even if not explicitly stated in the record. "Under this standard, evidence may be legally insufficient when the record contains either no evidence of an essential element, merely a modicum of evidence of one element, or if it conclusively establishes a reasonable doubt."

Queeman, 520 S.W.3d at 622 (*internal citations omitted*).

II. The evidence is legally sufficient to show beyond a reasonable doubt that Appellant qualifies as a "member" of a "criminal street gang."

Appellant was charged with and convicted for the offense of Unlawful Carrying Weapons, pursuant to Section 46.02(a–1)(2)(C) of the Texas Penal Code. Section 46.02(a–1)(2)(C) provides as follows: "A person commits an offense if the person intentionally, knowingly, or recklessly carries on or about his or her person a handgun in a motor vehicle or watercraft that is owned by the person or under the person's control at any time in which" the person is "a member of a criminal street gang, as defined by Section 71.01 of the Texas Penal Code." TEX. PENAL CODE ANN. § 46.02(a–1)(2)(C). A "criminal street gang" means "three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities." TEX. PENAL CODE ANN. § 71.01(d).

Appellant's sufficiency challenges focuses on the "member of a criminal street gang" element of the offense. (Appellant's Br. at 39–41). As noted in *Ex parte Flores*, "three or more persons meet the definition of a criminal street gang only when they—in addition to having a common identifying sign, a common identifying symbol, or an identifiable leadership—continuously or regularly associate in the commission of criminal activities. The statute does not apply to three or more persons solely because they have a common identifying sign or symbol." *Ex parte Flores*, 483 S.W.3d at 644 (*internal footnote omitted*). A "member" of a criminal street gang "must be one of the three or more persons who continuously or regularly associate in the commission of criminal activities." *Id.* at 645. To be a "member," an individual "must be one of three or more persons with a common identifying sign, symbol, or identifiable leadership and must also continuously or regularly associate in the commission of criminal activities." *Id.* at 648.

The evidence presented at trial shows that Appellant was not only a part of the Cossack Outlaw Motorcycle Gang, but qualified as a "member" of a criminal street gang. Appellant admitted to Corporal Michael Macias to having been involved with the Cossacks Outlaw Motorcycle Gang for four years (as of April 17, 2018). (RR vol. 4, pp. 28, 38; vol. 6, State's Ex. 1, 2:42–

2:50). He was confirmed as being a member of the Cossacks by Deputy Cisneros. (RR vol. 3, p. 86). McLennan County also confirmed Appellant as being a member of the Cossacks based on his arrest with gang members for a gang-related offense and his nonjudicial self-admission. (RR vol. 3, p. 130).

Deputy Cisneros identified the Cossack Outlaw Motorcycle Gang as being a criminal street gang. Members of the Cossacks continuously and regularly engage in assaults, threats of violence, intimidation, and illegal firearms possession. At the local level, Deputy Cisneros has known the Cossacks to be involved in assaults. (RR vol. 3, pp. 72–73, 95). One of those assaults took place on April 15, 2018, where several members of the Relentless Few motorcycle club were assaulted by people wearing Cossack and Kinfolk cuts. (RR vol. 3, pp. 94, 114, 119–24). During Appellant's time with the Cossacks, he was formerly a Sergeant-at-Arms for the Dallas chapter of the Cossacks. In his former role as a Sergeant-at-Arms, he reported directly to the president of the chapter and was a bodyguard to the president of the chapter. He was also the "enforcer" for the chapter, "meaning they can deal out the punishment for a member breaking the rules." The "punishment" could range from a "physical punishment" to a fine. (RR vol. 3, pp. 76–77). Appellant was also involved in the "Waco incident" where a fight broke out in the parking lot between members of the Bandidos and

members of the Cossacks, which turned into a shootout where several people were killed. (RR vol. 3, pp. 68–70, 90–92, 125, 138–39).

A rational jury could have found that that there was sufficient evidence to show that Appellant qualified as a "member" of a criminal street gang. Appellant was one of three or more persons who "continuously or regularly associate in the commission of criminal activities." *Ex parte Flores*, 483 S.W.3d at 648. Appellant was an admitted member of the Cossacks Outlaw Motorcycle Gang, a gang that continuously and regularly engages in assaults, threats of violence, intimidation, and illegal firearms possession. Appellant was formerly the Sergeant-at-Arms for the Dallas chapter of the Cossacks, a role wherein he answered directly to the president of the chapter and was the "enforcer" for the chapter. Additionally, Appellant was arrested as one of the gang members involved in the Waco incident wherein a fight broke out in a parking lot between members of the Bandidos and members of the Cossacks, which turned into a shootout—and was confirmed as being a gang member based on his involvement in the Waco incident.

Appellant's conviction for carrying a handgun on or about his person in a motor vehicle while a "member" of a criminal street gang was valid because he was not only aware of the criminal activity occurring within the Cossacks Outlaw Motorcycle Gang, but was an active participant in the illegal

activity—particularly assaults and threats of violence. Appellant was properly convicted and punished under Section 46.02(a–1)(2)(C) due to his personal involvement as one of the three or more persons who continuously or regularly associate in the commission of criminal activities. *See, e.g., Zuniga*, 551 S.W.3d at 736–38 (finding sufficient evidence to show that the defendant was acting as a member of a criminal street gang when he and other gang members assaulted and murdered two victims because the defendant was one of several people who had assaulted and murdered the victims, the defendant was confirmed as a gang member, and the attack on the victims was consistent with known gang activities); *Curiel v. State*, 243 S.W.3d 10, 16–17 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) (finding sufficient evidence to establish that the defendant committed the offense as a member of a criminal street gang when the defendant admitted to being a member of the gang and was acting as a soldier for the gang when he approached the victim); *Craddock v. State*, 203 S.W.3d 916, 921–22 (Tex. App.—Dallas 2006, no pet.) (finding sufficient evidence to show the offense was committed by a member of a criminal street gang when the defendant was with other gang members at the time of the assault and engaged in a pattern of assaultive behavior).

III. Conclusion.

The evidence is legally sufficient to show that Appellant qualified as a "member" of a criminal street gang for purposes of Section 46.02(a–1)(2)(C). The evidence shows that Appellant was one of three or more persons in the Cossacks Outlaw Motorcycle Gang who continuously or regularly associate in the commission of criminal activities.

Appellant's fifteenth issue should be overruled.

Conclusion and Prayer

For the reasons stated above, no reversible error has been committed and the State respectfully requests that the Court should affirm the judgment and sentence in all things.

Respectfully submitted,

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Certificate of Service

I certify that a true copy of the foregoing brief has been delivered to Lorna McMillion, Attorney for Appellant, through the electronic filing manager to her e-mail address on December 5, 2019.

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Certificate of Compliance

Pursuant to TEX. R. APP. P. 9.4(i)(3), I further certify that, relying on the word count of the computer program used to prepare the foregoing State's Response, this document contains 12,044 words, inclusive of all portions required by TEX. R. APP. P. 9.4(i)(1) to be included in calculation of length of the document.

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